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No. 615

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

JULES GARRISON,
Appellant,

vs.

WARNER BROTHERS PICTURES, INC., a corporation,
Appellee.

PETITION FOR CERTIORARI

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California
Attorney for Appellant.

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IN THE

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JULES GARRISON, *Appellant,* vs. WARNER BROTHERS PICTURES, INC., a corporation, *Appellee.*	No.....

PETITION FOR CERTIORARI

To The Honorable Chief Justice Earl Warren and To The Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, JULES GARRISON, respectfully petitions for a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit and in respect thereto sets forth as follows:

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1251; Section 1254 (1) and Section 2101 (c).

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered October 3, 1955. This petition for certiorari is filed within the time so allowed and extensions thereof by Justice Douglas to and including January 9, 1955.

OPINION BELOW

The opinion below is reported in 226 Federal (2d) 354 and is also appended at the end of this Petition.

QUESTIONS PRESENTED

(1) Whether the acceptance of an offer of reward of $1,000,000, offered by Warner Brothers Pictures, Inc., in publication by motion picture exhibition and newspapers, is revoked after the acceptance of the offer, by notice from the corporation's attorney to the individual who notified the corporation that he accepted the offer of the reward that it was withdrawn?

(2) Whether a publication of an offer of reward in newspaper and newsreel constitutes a contract which is accepted by notice to the offeror by telephone of its acceptance.

(3) Whether a reward, because it is large, should be nullified on technical grounds, and because the offeror is a motion picture company.

(4) Whether the picture itself, which was a part and parcel of the reward, defined the word "stunt" on which the offeree and the public may rely.

(5) Whether the findings and conclusions of law are clearly erroneous in that they are both inconsistent and contrary to the law and the evidence, and therefore violate Rule 52(a) Federal Rules of Civil Procedure.

(6) Whether the District Court failed to make specific findings in accordance with the admitted facts.

(7) Whether there had been a failure to comply with Rule 36, Federal Rules of Civil Procedure, and Rule 37 (c) Rules of Civil Procedure, so as to entitle the appellant for a reward.

(8) Whether plaintiff is entitled to recover attorney's fees and costs because of defendants' false answer to plaintiffs' interrogations, even if defendant gives explanations for the falsity. Does the District Court have discretion to waive the requirements of the rule and refuse to grant plaintiff's motion for attorney's fees and expenses under Rules 36 and 37(c) where defendants failed to respond fully and truthfully to request for admissions?

STATEMENT OF THE CASE

This case involves the answer to a Million Dollar Question. Did the appellant comply with the offer and accept it so as to be entitled to a million dollars? We are sure that if it were only a thousand dollars this case would not be here; it would be paid. But, the issue of a million dollars being involved raises important questions of contract law, phases of which have not been but should be decided by this Honor-

able Court, and other phases of which have been decided by the United States Circuit Court of Appeals in conflict with *Shuey v. United States,* 92 U.S. 73, 23 L.Ed. 697, which was decided by this Court, which related to the withdrawal of the offer of reward with relation to information leading to the arrest of John Curratt one of Booth's alleged accomplices in the slaying of Abraham Lincoln.

The offer of reward and its acceptance also becomes a matter of great importance in the light of the action of the House of Representatives in voting, on July 5th last, unanimously to pay a reward up to $500,000.00 to anyone who uncovers an effort to smuggle atomic bombs or nuclear material into the United States. When does such an offer become a binding contract? When and how may it be withdrawn?

This case is a suit by the Plaintiff, Jules Garrison, against Warner Brothers Pictures, Inc., for $1,000,000.00 for breach of contract. The breach grows out of an offer of the defendant studio made through its star in a picture called "The Flame and The Arrow", Burt Lancaster, to pay $1,000,000.00 to anyone who could prove that Burt Lancaster did not do all the stunts he is shown doing in a new picture (R. 305) and published at his instigation and the instigation of the studio on July 17, 1950, in the Los Angeles Mirror, a daily newspaper of general circulation and a similar offer made in a Warner Bros. Newsreel "to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and The Arrow." (R. 313).

The offers were made by Warner Brothers through its star, Burt Lancaster, through its publicity department as a part of an advertising campaign to build Burt Lancaster into a star position similar to the type once held by Douglas Fairbanks—stated by Mr. Alex Evelove, a publicity agent for Warner Brothers Pictures Corporation, which he directed:

> **"We wanted to prove that perhaps not since Douglas Fairbanks had there been an actor who could do the acrobatic stunts that Mr. Lancaster can do and that was the whole purpose of the campaign."** (R. 98).

> **"Q. And that was to prove that he himself had done them rather than someone else, is that correct?**
>
> **"A. That is right. And the film was photographed, as I remember, so that the camera would be on Mr. Lancaster when he did the acrobatic stunts so that the publicity and the stunts and everything would jibe."** (R. 98).

Warner Brothers Pictures issued publicity releases for the picture through Mr. Evelove and sent them to the newspapers. (R. 93). They also arranged for a Warner Brothers newsreel to take the newsreel of Burt Lancaster (R. 101)—Warner-Pathe Newsreel is a wholly owned subsidiary of Warner Brothers Pictures, Inc. (R. 102). Mr. Evelove saw the newsreel after it was returned to Los Angeles and made no changes in it after it was sent out.

The picture, "The Flame and The Arrow", starring Burt Lancaster, was produced by Norma Produc-

tions, financed by Warner Brothers (R. 113), of which Mr. Lancaster was an officer. It was produced on the Warner Brothers' lot, using Warner Brothers' facilities and financed by Warner Brothers under an agreement by which the picture would be distributed by Warner Brothers for a period of fifteen years and to collect all the money from distribution and after all those costs had been repaid, the balance, if any, would be divided between Norma Productions, Inc., and Warner Brothers Pictures, Inc. (R. 114)—Plaintiff's Exhibit No. 7, R. 314 (a typical producer-distributor contract). The publicity was one of the costs which was to be deducted and was to be handled through Warner Brothers' publicity department. (R. 115).

In furtherance of the program of building Burt Lancaster into a great athletic star, Warner Brothers' publicity department arranged for Burt Lancaster to go to the vault of the Bank of America and posed for a picture of publicity purporting to show $1,000,000.00 to be offered as a reward. (R. 121). (R. 305). And there he caused the offer to be publicized by the Los Angeles Mirror on July 17th, 1950. (R. 305). That offer was as follows:

> "THERE'S A $1,000,000 FOR YOU; JUST PROVE BURT DIDN'T DO IT
>
> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.

"It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture.

"In 'The Flame and The Arrow,' apparently no drawing-room drama, Lancaster performs somersaults from horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone beserk.

"Virginia Mayo co-stars with Lancaster in the film. Enough to make any man acrobatic."

The newsreel was also released, Plaintiff's Exhibit No. 6, which read as follows:

"ACTUAL NEWSREEL SCRIPT

"Anner.: In Holywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow.'

"Lancaster: 999,999,999,999, One million dollars. I had to count it three times to make sure.

"Girl: Here he is, ladies.

"Rocklin: Hello, Burt. I'm Miss Rocklin of the Los Angeles Mirror.

"Lancaster: How do you do?

"Rocklin: Tell me, is this really on the level?

"Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself.

"Marsh: Burt, I'm Marilyn Marsh of International News Service.

"Lancaster: How do you do, Ma'am?

"Marsh: I just saw you in 'The Flame and The Arrow.' Now look. You can't make me believe that it was you doing those somersaults from, what was it, six horizontal bars, 50 feet in the air?

"Lancaster: Sixty feet. Why not? Before I got lucky in Hollywood, I used to make my living in the circus. I did stuff like that for coffee and donuts.

"Marsh: What happened if you missed?

"Lancaster: Somebody got an extra donut.

"Helming: But, I'm Ann Helming of the Hollywood Citizen-News.

"Lancaster: Well, hello.

"Helming: It's hard to believe that any producer wants to give away a million dollars.

"Lancaster: Well, Ann, they really don't want to give away a million dollars if they can help it. But this is a genuine, bona fide offer.

"Helming: What if somebody proves that it wasn't you who walked across the pole 35 feet in the air?

"Lancaster: If anybody can prove that, they'll get the million dollars and I'll go back to coffee and donuts. Satisfied?

"Rocklin: Sounds good enough for me. Come on, girls, let's take another look at 'The Flame and The Arrow.'"

Plaintiff first saw the newsreel offer in July, 1950. (R. 142). He knew Don Turner, a stunt man, and had seen him around the studios. (R. 143). When

he saw the picture, "The Flame and The Arrow", particularly as it related to playing the part of Dardo in the picture, he recognized Don Turner, and not Burt Lancaster, at the head of the band of horses in the courtyard where the big fight takes place and in the rescue of Papa Pietro and in the roof stunt—going up on the roof. That was where the midget was carried on his shoulders up over the roofs, and there were other places. (R. 144). He also observed that in the fight sequences with relation to the duel between Allesandro and Dardo that it appeared to be Turner and not Lancaster. He telephoned the studio (R. 144-145), and they couldn't decide who to turn him over to, so they finally turned him over to Freston & Files, attorneys for Warner Brothers. He then talked to Mr. Gordon Files.

> "I said that I had seen the motion picture called The Flame and The Arrow or, rather, I had seen the offer in the newsreel wherein Burt Lancaster had, in behalf of Warner Bros., offered $1,000,000 to anyone who could prove that 'I do not do all of the stunts in the picture,' and I said that I felt sure I could prove it and told them that I had tried to get the award accepted publicly in some way but didn't do it so I was calling them up to let them know and they didn't want to give me the $1,000,000 and I told them I would go and get a lawyer and try to get it for myself. That was about the substance of it."

Having been rejected by Mr. Files, he then consulted Mr. Morris L. Marcus, an attorney, who then

forwarded acceptance of the offer and a demand of the reward to Warner Brothers Pictures (R. 386).

On cross examination, Mr. Garrison testified that he had not only seen the newsreel, but he had seen the newspaper article in the mirror (R. 150-151). He stated that in his conversation with Mr. Files he could prove that Mr. Lancaster did not do all his own stunts and he would like the $1,000,000. Mr. Files stated he didn't know anything about it, (R. 151) and he went on to explain some of the stunts that he thought Mr. Lancaster didn't do. He might have mentioned Billie Curtis, the midget, and that Billie Curtis had admitted being carried up on the roof by *Don Turner* (R. 153), and he might have told Mr. Files that Alan Pomroy admitted to him that Don Turner did the stunt of climbing up on the roof (R. 153). He admitted that he said he would take less than $1,000,000 (R. 155) but did not mention the amount, and that he might have said that he wanted to go to New York for the current theatrical season and try to work there, and in order to accomplish that he needed a suit of clothes and transportation and some spending money (R. 155), and that something could be done for him without the necessity of his taking any action which would publicize the claim (R. 156).

Garrison and Files had some discussion about settling the matter without the possibility of his having to take any action to cause any publicity on the claim. He denied that Mr. Files told him that if any such offer had been made he wanted him to know it was

withdrawn. Gordon Files, attorney for Warner Brothers, testified having three conversations with Garrison. In the first:

"He then proceeded to tell me that he had learned of some advertising which had been put outstating that Warner Bros. would pay a million dollars to anybody who could prove that Burt Lancaster had not done all of the stunts that were credited to him in the motion picture The Flame and The Arrow.

"I said something to the effect that I wasn't familiar with that, and Mr. Garrison then proceeded to tell me more.

"He said that he had worked on the picture as an extra; that he knew about this offer having been made, and that he believed that he could prove that Mr. Lancaster had not done certain of the stunts.

"The ones he referred to particularly, and that he mentioned in that phone conversation, were three. One was, he said, climbing up on to the rooftop with the little boy. Mr. Garrison said that was done by Don Turner and by Billie Curtis, a midget. He said he did not know whether he could get those people to testify for him or not, but that he knew that those people had done that, and that they would have to say that.

"The second thing he mentioned was horseback riding. He said he knew that Mr. Lancaster had not done some of the horseback riding and that the Hudkins brothers, who had furnished the horses would be willing to say that they helped

Don Turner get on one of the horses for one of the sequences in the picture.

"He told me that he had talked to Alan Pomroy about this; that Alan Pomroy had admitted that it was Don Turner who had climbed up on the roof of the house and that he, Garrison, had a recording of his conversation with Mr. Pomroy.

"He said he knew that Don Turner's name had been mentioned on the call sheet out at the studio for certain days, indicating that Mr. Turner had worked on this picture.

"He said that we would probably find out in the wardrobe a duplicate Dardo costume which had been up for Don Turner." . . .

Mr. Files told him he didn't know anything about it, hadn't seen the picture and didn't know the circumstances. He said he got a second phone call from Mr. Garrison, at which time he told him that he had made an investigation and it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture. (R. 191). He said that if he couldn't make any arrangements he was going to hire an attorney and that he would give him a week to think it over. On the second conversation, Mr. Files stated:

"Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is

withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture.

"Mr. Garrison said he could prove the things that he had talked to me about in the previous conversation and that if he couldn't make an arrangement with us he was going to employ an attorney. He said that he would give us a week to think it over.

"I think again he mentioned that he would prefer to handle it directly and not have an attorney in it. He said that if he didn't hear from us in a week he was going to go to an attorney." (R. 191-192).

A week later they received a letter from Mr. Marcus dated October 20th, and he had a phone call from Mr. Marcus. Mr. Files stated to Mr. Marcus:

"that we had received his letter dated October 20th, 1950; that our position was that Warner Bros. had made no offer; that if any offer should be deemed to have been made in the past, it had been revoked, and furthermore, I told him that Mr. Garrison was mistaken as to the facts, that Mr. Lancaster had actually done all of his own stunts in the picture, The Flame and the Arrow."

Proof at Trial That Don Turner Did Stunts in Picture Doubling for Lancaster

In the trial it was conceded that Burt Lancaster was taken to Warner Brothers Newsreel under the direction of the publicity department for the newsreel offer.

DONALD TURNER, stunt man who does doubling and stunt work in the picture business (R. 164) testified that he had been engaged in that business for twenty years, and Turner testified as follows:

"Q. Do you recognize that picture that you saw here in court as being the same identical picture as the first one you saw?

A. I would say so, yes.

Q. Now, particularly directing your attention to the character Dardo, do you recall the sequence in it where Burt Lancaster, in the part of Dardo, shoots an arrow which purports to hit the falcon?

A. Yes.

Q. In the court yard?

A. Yes.

Q. And then shortly after that Ulrich tells the soldiers to seize the boy. Do you remember that sequence?

A. Yes.

Q. Now, there was a sequence immediately following that that shows Dardo running across the top of this peaked roof, shortly before the time that he is struck by an arrow. Who played the part of Dardo running across the roof with the boy in his arms in that sequence?

A. I doubled for Mr. Lancaster running across the roof.

Q. And that was you portrayed on the rooftop; is that correct?

A. Yes.

Q. With relation to the character Rudie, that is, the boy, do you remember who it was that you carried across the roof at that time?

A. Yes, I member.

Q. Who was it?

A. Billie Curtis.

Q. Is that Billie Curtis, the midget?

A. Yes, sir.

Q. Now, directing your attention to the sequence where the soldiers ride—or, not the soldiers, but the band rides into the court yard to rescue Papa Dietro with these sapling spears,—do you recall that?

A. Yes.

Q. All right. Now, in going into the court yard there with the spears, and in this hand-to-hand encountering, what character did you portray?

A. I doubled for Burt Lancaster in the part of Dardo.

Q. Then you were the character Dardo?

A. I rode into the square.

Q. And in the course of that sequence there, you engaged in some part in the fight with the soldiers, where you were using the sapling spears; is that correct?

A. Enough to bring the two factions together.

Q. And then in that following sequence, where the character Dardo jumps on to the oxcart and cuts Papa Pietro down, and drives the team out of the square, what part did you play in that sequence?

A. I doubled for Burt Lancaster.

Q. In the character of Dardo?

A. In the character of Dardo, and I drove one horse out, not a team.

Q. Now, getting along to the next sequence, and that is the one involving—do you recall near the end of the picture is where there is a sword fight between Allessandro and Dardo that occurs there at the time that Dardo kills Alessandro?

A. Yes.

Q. Now, that was the one that occurred in the castle shortly before the time that Ulrich was killed by the bow and arrow by Dardo; isn't that right?

A. Yes, I think so. Yes.

Q. Now, in that sword fight or duel, particularly as it related to the shots that were taken showing two men dueling, where it was taken from the back of the character Dardo and showing the face view of Ulrich—I mean of Alessandro, were you playing the part of Dardo in that sequence at that time?

A. I think I worked in two shots that we saw in the picture.

Q. In that duel, with your back to the camera; is that correct?

A. That is correct.

Q. Were you there at the time that these purported arrow shots were made with relation to the piercing of the falcon, and the shooting of Ulrich?

A. I think I was on salary on the picture. I didn't actually see it being done.

Q. Now, with relation to these particular shots, let's take the roof shot, for example—

Mr. Williams: Just a minute. You used the word 'shot' in connection with the arrow, and now you are using the word 'shot' in another way.

Mr. Dryden: I will reframe it.

Q. (By Mr. Dryden): I am not speaking about shooting an arrow. You said you don't recall being there watching that scene?

A. No, I wasn't.

Q. In this situation where you carried Billie Curtis across the roof, you were on stunt man's pay at that time, were you?

A. I am always on stunt man's pay, as you call it; that or a double's pay, at any time I work in the studio.

Q. Then, in addition to that, when you are working, if you do something such as a stunt, you will receive a pay adjustment; isn't that right?

A. You receive adjustments for your ability to save time, your knowledge as a person doing doubling work, and for additional—well, work, in any sense you might want to phrase it.

Q. With relation to the sequence of running across the roof with Billie Curtis, you did receive additional or adjustment pay of $145 approximately for that sequence; isn't that correct?

A. I received more money. I don't know what it was per day.

Q. In the sequence when you were engaged in the dueling, you received more money; isn't that correct?

A. I always do.

The Court: What do you mean, you always do?

The Witness: My salary is known through the studios for doing fencing, as above the minimum of $70 a day, and I get a minimum of $100 a day.

The Court: When you do fencing?

The Witness: When I do fencing, because there is an adjustment.

The Court: How about this roof incident? Did you get any extra pay for that?

The Witness: I did, yes, sir.

Q. (By Mr. Dryden): And with relation to the fight with the saplings when you came into the court yard and rescued Papa Pietro, you received extra pay for that, didn't you?

A. I did. (R. 164-168).

The trial court made Findings of Fact in which it set out that on or about July 17, 1950, the defendant, acting through its Studio Publicity Manager, cause Burt Lancaster to appear at the vault of the Los Angeles bank, where he was photographed by a motion picture camera and a news real sequence prepared showing said Burt Lancaster behind the bars in said bank vault in his shirt sleeves purporting to count money, to-wit, One million dollars. (R. 40).

But, in the said Findings, the Court finds that the language originally sent by the Publicity Department was re-edited by the film editors or script writers in the employ of Warner News, Inc., and put in the following words:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and The Arrow."

in the newsreel. (R. 42, 43).

The court in this Finding finds that: ". . . said defendant did not offer to pay the sum of $1,000,000 or any sum to anyone who could prove that said Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture." (R. 43).

The court finds that the newsreel and the newspaper in which the reward was offered was received as Exhibit 6, but found that it was not true that the plaintiff did not gather or seek evidence or proof as required by said alleged offer or accept the offer and did not notify defendants of plaintiff's acceptance of the offer.[1] (Para. III, R. 43).

The court made Findings of Fact set out Conclusions of Law. (R. 40 to 47).

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[1]This is directly contrary to the evidence. The offer was to anyone who "can prove" etc. (R. 305; R 313). The plaintiff communicated his acceptance to the studio and to Gordon Files, its attorney. (R. 144 et seq.; R. 187).

It finds that the defendant did not offer to pay $1,000,000 or any sum to anyone who proved that Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture. (R. 43). Then it finds that the plaintiff did not accept the offer as shown in the newspaper article and in the Motion Picture reel. (R. 43, sub. 3). Then it finds that plaintiff did not submit proof; then it finds that plaintiff did not perform any or all the conditions required by the contract to be performed on his part. (R. 44). Then, it finds that the alleged offer was, in fact, expressly withdrawn, before plaintiff attempted to accept the same. (R. 45, paragraph IX). Then it finds that Burt Lancaster himself actually performed "all his daring stunts shown in the picture The Flame and the Arrow," but further finds that Don Turner doubled for Burt Lancaster in carrying the character Rudi for about twenty-five feet along the crest of a roof, and carried a midget; but finds that this was not a stunt and this was not daring or dangerous. He also finds that in the sequence which shows a character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to a bed of a stationery two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous. Without limiting the effect of the Court's find-

ing that said Burt Lancaster did personally perform all of his daring stunts in said picture, the Court finds specifically that he did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alessandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is portrayed by a double, are two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous. (R. 45, 46).

The court then concludes:

I.

"That no valid offer as set forth in the complaint herein was made by defendant Warner Bros. Pictures, Inc.

II.

"That said alleged offer was not accepted by the plaintiff herein nor was any attempt made to accept said alleged offer until after the same had been expressly withdrawn.

III.

"That Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow.

IV.

"That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not

stunts and were not daring or dangerous." (R. 46, 47).

Upon these inconsistent and contradictory Findings, the Court gave judgment to the defendant corporation.

The court also denied a motion for attorney's fees and costs under Rule 37(c), F. R. C. P. although the defendant admitted giving a false answer to interrogations under Rule 36.

SPECIFICATION OF THE ASSIGNED ERRORS IN THE COURT OF APPEALS, AND RENEWED HERE.

The appellant specified below and specifies the following errors upon which he relies:

I.

The findings and conclusion of law, and each of them, are contrary to the law and the evidence.

II.

The decision and judgment of the United States District Court are contrary to the law and the evidence. An offer of reward was made and published throughout the nation, and accepted by the plaintiff. The plaintiff is entitled to the reward thus offered.

III.

The District Court erred in deciding and finding that, although an offer had been made by Warner Pictures,

Inc., and in connection therewith an offer of $1,000,000.00 reward was offered if it could be proved that the star in the picture did not perform all the stunts therein shown, the plaintiff was not entitled to the reward because it had been withdrawn prior to the acceptance thereof.

IV.

The District Court erred in finding that an offer of reward made publicly through the medium of motion pictures can be withdrawn in any manner and in any way other than in the same manner in which the offer was made. The evidence is that there was no such withdrawal.

V.

The District Court erred in deciding and finding that the acts of the hero in the picture (Burt Lancaster) which were not performed by him were not "stunts" within the meaning of the offer of reward.

VI.

The District Court erred in failing to make specific findings in accordance with the admitted and undisputed evidence, as follows:

(a) That the defendant Warner Brothers Pictures, Inc., a corporation, together with Norma Productions, Inc., a corporation, made the motion picture of "The Flame and the Arrow" under a contract, and after this motion picture was made it was distributed by Warner Brothers Pictures, Inc.

(b) That the defendant Warner Brothers Pictures, Inc., made a Newsreel offer, as part of its publicity campaign to distribute and sell the motion picture "The Flame and the Arrow", in which it offered a reward to the public, generally, including the plaintiff, of $1,000,000.00 to anyone who could prove that Burt Lancaster did not do or perform all of the stunts he was shown doing in the new picture "The Flame and the Arrow."

(c) The District Court erred in failing to find that in the Newsreel offer of reward to the public generally, there were scenes taken in a bank vault in which Burt Lancaster and three newspaper reporters were shown in the presence of stacks of money, represented to be $1,000,000.00 in cash, and this newsreel had the following dialogue:

> "In Hollywood, Burt Lancaster counts the One Million Dollar Reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and the Arrow.'"

(d) The District Court failed to find the undisputed fact that at about the time of the showing of the newsreel set out in the foregoing assignment, a news item appeared in the Los Angeles Daily Mirror, a newspaper of general circulation in Los Angeles County, which news item was based upon a press release issued by Warner Brothers Pictures, Inc., and was authorized, showing a picture of Burt Lancaster and the newspaper

reporter, Kendis Rochlen, underneath which picture it was stated:

> "$1,000,000 if you can prove Burt didn't do it.
>
> "Things cannot be so bad in the movie business. Warner Brothers offered to give away $1,000,000 today. It is waiting in cash for anyone who can prove Burt Lancaster did not do all the stunts he is shown doing in a new picture. In 'The Flame and The Arrow,' apparently no drawing room drama, Lancaster performs somersaults from the horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer, gone beserk."

This publication was made pursuant to press releases of Warner Brothers Pictures, Inc., and never repudiated or withdrawn by them.

(e) That the District Court erred in failing to find that the defendant Warner Brothers Pictures, Inc., did not repudiate or disavow or withdraw the same publication or announcement, nor its newsreel offer at the time the plaintiff accepted the same, nor did it ever publicly repudiate or withdraw the offer. That it was accepted by the plaintiff and proof offered by him, which was rejected by the defendant.

VII.

The District Court erred in finding, contrary to the evidence, that the plaintiff failed to accept the offer and failed to notify defendant Warner Brothers Pictures,

Inc., and its attorneys of said acceptance, and failed to notify them of the facts constituting the acceptance.

VIII.

The District Court erred in Finding of Fact X that the activities therein described, performed by Don Turner, a Hollywood stunt man, for Burt Lancaster, did not constitute stunts. This is clearly against the weight of the evidence, and the further finding that said stunts were not daring or dangerous is against the weight of the evidence.

IX.

Errors of law occurred at the trial, namely:

(a) The ruling in substance by the Court that acts done by agent corporations of defendant were not done by defendant.

(b) The interpretation of the offer in a strained and unnatural manner against plaintiff, when the offer was prepared by defendant, and the plain, reasonably meaning as contended for by plaintiff would give it life. The construction urged by the defendant and adopted by the court was one in favor of the defendant and against the plaintiff and made it meaningless and a trick and snare.

X.

The violation of Rule 33 of the Federal Rules of Civil Procedure by defendant in giving false answers under oath to Interrogatories submitted to said defendant, namely to Interrogatories No. 10 and No. 11.

XI.

The violation of Rule 36 of the Federal Rules of Civil Procedure by defendant in giving false answers to Request for Admission, namely to Request No. 3.

XII.

The District Court erred in failing to grant plaintiff's motion for attorneys fees and expenses under Rule 37 (c), which is designed to enforce the provisions of Rule 36. The rule is mandatory that a judge shall allow a reasonable fee to attorneys bringing the suit, where the defendant fails to respond fully and truthfully to request for admissions.

XIII.

The District court erred in failing to grant plaintiff's attorneys reasonable compensation for 250 additional hours of time spent and $600.00 expense incurred by reason of the failure of the defendants to make admission and thus "to expedite the trial and relieve parties of the costs and labor of proving facts which would not be in dispute on the trial and the truth of which could be ascertained by reasonable inquiry."

SUMMARY OF THE ARGUMENT

On or about July 17th, 1950, the defendant corporation, acting through its studio publicity department, caused publicity to be broadcast in the newspapers, to-wit, the Los Angeles Daily Mirror, a newspaper of general circulation, and its own motion picture newsreel, in which it offered One Million Dollars to anyone who could prove that Burt Lancaster (the star whose picture was depicted in the newsreel and the newspaper) did not perform the stunts in which he is shown doing in the picture "The Flame and The Arrow." The purpose of this publicity was to build up Burt Lancaster into another Douglas Fairbanks and to convince the world and the public wherever these pictures were shown that he was highly acrobatic and a skilled actor. Actually two different offers were made. In the newspaper article in which he posed for pictures and caused to be published, the offer was $1,000,000 cash to anyone who can prove Burt Lancaster didn't do all the stunts. (Rd. 305). "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305).

In the newsreel disseminated by a subsidiary corporation of Warner Brothers, the offer was $1,000,000 reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and The Arrow." (R. 313, R. 42-43). The offer was made and disseminated through the motion picture theatres of defend-

ants' distributing corporations, and through the Los Angeles Mirror. It was thereafter published and broadcast and distributed and seen by plaintiff and the general public.

The plaintiff saw the motion picture and the newsreel, and thereafter communicated with Warner Brothers his acceptance of the offer, and offered to prove by telephone to Warner Brothers and to its attorney that Burt Lancaster did not perform all the stunts he was shown doing in the picture, and did not perform all his daring stunts shown in the picture. That the offer to prove these facts was made to Gordon Files, attorney for Warner Brothers Pictures, Inc., by the plaintiff personally and later by his attorney Morris L. Marcus.

An attempt was made by Gordon Files to withdraw the offer to the plaintiff personally, but the defendant at no time ever withdrew the offer in the same form or manner in which the offer was made.

That the plaintiff did communicate with Gordon Files, attorney for the defendant, that he can prove that Burt Lancaster did not do the stunts he is shown in the "Flame and The Arrow" to be doing and this constituted acceptance of the offer and a binding contract with the defendant. The plaintiff further did prove by admissions of the defendant and at the time of trial that Burt Lancaster did not perform many of the stunts shown in the picture in which it was represented that he did perform. That among the sequences in the picture which he did not perform was

one showing the character "Dardo carrying the character Rudi for about twenty-five feet along the crest of the roof, in the distance and silhouetted against the sky." That this stunt was not performed by Burt Lancaster but by Don Turner, who doubled for Lancaster and carried a midget.

Plaintiff proved that in the sequence that showed the "character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by Don Turner who doubled in said sequence for Burt Lancaster." That in the duel scene between Burt Lancaster in which the character Dardo was shown fighting the character Alessandro, there are shots of Don Turner doubling for Lancaster.

The interpretation by Warner Bros. in its payroll showed that it used "stunt" men for the scenes involved in place of Lancaster and paid them stunt men's wages. (R. 36).

Upon the publication either through newspaper and its newsreel which Warner Brothers Pictures caused to be disseminated its offer of One Million Dollars it was a unilateral offer which upon acceptance became a binding contract. That the plaintiff did accept the offer and at no time was the said offer ever withdrawn as required in the case of an offer, by pub-

lication or pictures, and that the plaintiff's acceptance of the offer created a valid, binding contract which the defendant was required to perform and carry out. That the trial court's decision is contrary to law.

The opinion of the Court of Appeals is an attempt to justify the defendant's position on extremely hypertechnical grounds.

Analysis of Opinion of Court of Appeals

The district judge, sitting *pro tem* in the Court of Appeals writes that "the illusory offer[2] apparently confounded Garrison's trial attorney. The complaint alleged, among other things, that Warner Brothers offered to pay the sum of money to anyone who could prove Lancaster 'did not do or perform all of the stunts he was shown doing *or purported to perform*' in the motion picture. (Emphasis supplied.) A careful examination of the record fails to reveal any evidence in support of the making of an offer in the words or language alleged in the complaint. The trial court's finding that no offer as set forth in the complaint was clearly correct."

There was an offer of a million dollars made—there were two offers, in fact. (R. 305, 313.) The case was tried on that theory. There was no misapprehension on the part of the trial judge or the parties

[2]This was not an "illusory" offer or promise but an actual one. An illusory promise is an illusion. By the phrase "illusory promise" is meant words in promissory form that promise nothing. See *Corbin*, Vol. 1, Sec. 145, page 461. An illusory promise leaves future action subject to the promissor's own will. Such is not the case here. The size of the reward did not change the form of the promise.

as to what the offers were, nor the issues as to whether the offers, as made and published were accepted.

The statement of the Circuit Court ignores the new Rules of Civil Procedure for the District Courts of the United States and reverts back to the technicalities that existed prior thereto. The new rules merely require a *claim for relief* (Rule 8), and a short and plain statement showing the pleader is entitled thereto (Rule 8 (2)). Here the claim was for $1,000,000 for breach of contract. There was no doubt in the defendant's mind nor the trial court's mind as to the issues. The Circuit Court's opinion, however, would bind the plaintiff to technical pleadings now abolished, and this court should grant certiorari to correct the erroneous view expressed therein. "Claim for relief" is less hairsplitting than "cause of action." It is necessary only to state a *claim* for relief.

Mortensen v. Chicago Great Western Ry. Co., 5 Fed. Rules, Sec. 8a, 25 Case 3;
Nester v. Western Union Telegraph Co., 25 F. Supp. 478;
Re Kantor's Delicatessen, Inc., 34 F. Supp. 898.

The Federal Rules of Civil Procedure enjoin simplicity, conciseness and directness and technical forms are eschewed.

Metzger v. Breeze Corp., Inc. 37 F. Supp. 693.

A complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to *any relief* which the court can grant.

Keiser v. Walsh, 118 Fed. (2) 13.

Plaintiff should be granted the relief to which he is entitled irrespective of the theory of their pleadings.

Gresy v. National Bank of Portland, 31 Fed. Supp. 524.

The finding had to be according to the claim as tried. The opinion of the Court of Appeals would revert to "causes of action" under complaints as they formerly existed.

The case was tried on a claim for a million dollars on the two offers as made (R. 305, 313) and as accepted by plaintiff. It was not the plaintiff's attorney who was confounded, but the defense was seeking to confound the courts with hypertechnical defenses,—that the "stunts" were not "stunts" but trick photography—that there was no offer, that the offer was revoked, etc., etc.

But the offers were made on the basis of the picture, as shown to the public. Nowhere was it represented that trick photography was used in making up the daring stunts shown in the picture. These were represented to the public and the plaintiff as *daring stunts* and the offer of the reward was

"Warner Bros. offered to give away $1,000,000 today.

It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305)

Actual Newsreel Script:

Anner: In Hollywood. Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster himself, didn't perform his daring stunts in "The Flame and the Arrow." (Pl. Ex. 6.)

No exception was claimed for "trick photography."

If the "stunts" were in fact trick photography, they were still not performed by Lancaster and plaintiff is entitled to recover.

The plaintiff and the public had a right to accept the picture as represented and not as "tricked" and defendants should not be allowed to escape their liability by showing that what they represented to be a stunt was in fact partly trick and deceptive photography of which the public and the offeree were not aware.[3]

The acceptance by the Court of Appeals of the nebulous explanation that motion pictures are an illu-

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[3]In *Plate v. Durst*, 24 S. E. 58; 42 W. Va. 63, the defendant in defense of a suit for $1,000 and a diamond ring which he promised claimed it was a jist. The Court said: "Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile."

In the motion picture newsreel offer Lancaster represents that it is a genuine offer but is "really on the level, so much so that I'm trying to figure how to win it myself." See also *Nyasly v. Rowan*, 17 Vic. Law R. 663.

sion and that what constitutes a "daring stunt" cannot be tested by the apparent danger created through the ordinary practices of the dramatic arts makes offers of reward by motion pictures, television radio and stage subject to the whim of the offeror and deceptive of the general public and this petitioner to whom these representations and offers were made.

There was nothing illusory about the publicity which the producers caused to be published in the newspapers and on which they were building another Douglas Fairbanks character in Burt Lancaster at great profit to themselves.

There was nothing illusory in their newsreel of Lancaster counting out what was represented to be a million dollars in a bank vault and stating:

> "Rocklin: Tell me, is this really on the level?
>
> "Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself."

And in the newspaper article which it caused to be published and publicized:

> "Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture."

These were not labelled "publicity" a "false" or "an illusion." They were promulgated as genuine and

accepted as such, as the plaintiff had a right to do. He took them at their word. As one case so aptly stated where an offer was made in jest—the jester would have to pay for his joke.

Plate v. Durst, 24 S. E. 580, 42 W. Va. 63;
Nyasly v. Rowan, 17 Vict. L. R. 663.

So here, the motion picture company should be made to pay for its "illusion" which it represented genuinely to the public in order to build up Lancaster as an acrobatic star.

The subject of rewards affects government, state, county and city; television, radio, motion pictures and the theater. There should be no "illusions" that enable the offeror to escape when it is accepted be it a can of coffee, $64,000 question, a refrigerator, a washing machine, word puzzles, the capture of notorious criminals, information regarding atomic energy, or to anyone who prove that an actor did not perform the stunts which it is represented in a picture that he did perform. When in fact he did not perform them—they were performed either by a stuntman doubling for him or falsely represented in trick photography. This court should grant certiorari and settle the question.

That the findings of the trial court are inconsistent, inadequate and contrary to the law and the evidence.

That plaintiff is also entitled to counsel fees and costs under Rule 37(*c*) for the reason that the defendants made false answers to the request for admis-

sions under Rule 36 of the Federal Rules of Civil Procedure and Federal Rules of Civil Procedure §37(c).

That the defendants admitted that it falsely answered the question regarding the portrayal by double Don Turner for Burt Lancaster of the sequence in the picture "The Flame and The Arrow." (R. 66). And said admission of falsity entitles the plaintiff to said counsel fees and costs as prayed for.

REASONS FOR GRANTING THE WRIT

An important question of contract law has been decided both by the United States District Court and the United States Court of Appeals for the Ninth Circuit (by a District Judge sitting therein) in conflict with the applicable contract law on the subject of rewards. The subject becomes one of great importance due to the fact that the House of Representatives unanimously voted, on July 5th last, to pay a reward of up to $500,000 to anyone who uncovers an effort to smuggle atomic bombs or nuclear material into the United States, and, it was reported that there was a million dollars reward offered at one time for the capture of Adolph Hitler. Television today offers many kinds of rewards. When is the contract binding? When is it withdrawn or cancelled and how?

The subject of rewards and the contract pursuant thereto becomes one of great importance, therefore, and should be decided by this Honorable Court.

Furthermore, the decision of the United States Court of Appeals is in direct conflict with *Shuey v. United States,* 92 U.S. 73, 23 L.Ed. 697, which holds that a reward that is offered generally to the public is withdrawn when there is notice through the same medium. The Court of Appeals said in its opinion:

> "Garrison urges that the attempt to revoke the offer by direct communication with him was ineffectual because the revocation must have been made by the same means as used in making the offer—newsreels, newspapers. This unique contention is not supported by any authority or reason."

In *Shuey v. United States, supra,* this court held that an offer of a reward made by means of a published proclamation can be revoked in the manner in which it was made. (22 L.Ed. 697). Mr. Justice Strong said that in that case the claimant was entitled to a liberal reward—promise for information conduction to the arrest, "and that reward he has received." The court pointed out, "like any other offer of a contract, it might therefore be withdrawn before the rights had accrued under it, and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact did not show that any information was given by the claimant or he did anything to entitle him to the reward offered until five months after the offer had been withdrawn. . . . The offer of the reward not having been

made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made."

In the instant case, the offer of reward was made through publications and it had to be revoked in the manner in which it was made—which was never done. It was only after the appellant accepted the offer in accordance with the terms therewith that he "could prove that Actor Burt Lancaster, the star of a motion picture entitled 'The Flame and The Arrow', did not perform all the daring stunts he was shown doing in the motion picture" that the attempted withdrawal was made. This was too late.

Important questions of law are therefore presented in this case which have not been decided, but which should be decided by this Honorable Court.

ARGUMENT

I.

THE DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT AND CIRCUIT COURTS ARE CONTRARY TO THE LAW AND THE EVIDENCE. AN OFFER OF REWARD WAS MADE AND PUBLISHED THROUGHOUT THE NATION, AND ACCEPTED BY THE PLAINTIFF. THE PLAINTIFF IS ENTITLED TO THE REWARD THUS OFFERED.

The defendant, through its agents and representatives, caused two offers of reward to be made and broadcast.

The defendant corporation caused an offer of reward of $1,000,000 to be made in the Los Angeles Mirror, on Monday, July 17. 1950, as follows:

> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new pictures." (R. 305).

Another offer of $1,000,000 was made in the newsreel, as follows:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not per-

form his daring stunts in 'The Flame and the Arrow.'" (R. 42, 43).

The plaintiff accepted the offer. The offer never was withdrawn, even to this date, in the form and manner required by law, which is through the same medium as the offer.

The plaintiff in this case not only could prove the offer being to anyone who "can prove"—but did prove —that the actor Burt Lancaster did not perform "all his stunts shown in the picture, nor all his daring stunts." The offer to anyone who "can prove" and communication of acceptance alone to the defendant corporation, or its attorney, was sufficient to establish a binding contract. The abortive attempt of the attorney to "withdraw" the offer after the plaintiff had communicated with him was not and could not avoid the plaintiff's acceptance and binding effect of the contract.

The case being tried in California and the offer having been made in California is governed by the laws of the State of California.

Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

In *Ryer v. Stockwell,* 14 Cal. 134, 73 Am. Dec. 634, it was held that the offer of reward of compensation by public advertisement, either to a particular person or a class of persons, or to any and all persons, is a conditional promise. That if anyone to whom such offer is made shall perform the service before the offer

is revoked, such performance is a good consideration and the offer becomes a legal and binding contract and may be enforced by a person performing the services. (See *Wilson v. Stump,* 103 Cal. 255).

And, before an offer of reward can be revoked—it can only be revoked in the same form and manner that the offer was made, and with the same amount of publicity of publication.

Shuey v. U. S., 92 U. S. 73, L. Ed. 697.

In *Carlill v. Carbolic Smoke Ball Co.,* 1 Q.B. 256, the properietor of a medicine published an offer to pay one hundred pounds to anyone who should use his medicine as directed and thereafter catch influenza. In reliance on this, the plaintiff used the medicine and caught the influenza. The use of the medicine was an operative acceptance consummating a unilateral contract. No notice was necessary.

The contract in this case was a unilateral contract which was consummated as soon as the first substantial act had begun by the plaintiff. And see the following cases:

Robertson v. U. S., 343 U. S. 711; 96 L. Ed. 1237, 1240;
Williams v. United States, 12 Court of Claims 192;
Stone v. Dysert, 20 Kans. 123;
Mosley v. Stone, 56 S. W. 965, 108 Ky. 492;
Louisville & M. R. Co. vs. Goodnight, 10 Bush 522, 19 Am. Rep. 80;
Stevens v. Brooks, 2 Bush 137.

Where a reward has been offered for the finding and return of lost property, the offer is not revokable after part performance in reliance upon it, even though the offerer gives notice before there has been an actual return of the property. Even in such case the finder has the lien to secure payment of the reward.

Wilson v. Guyton, 8 Gill. 213 (Md), Mass.;
Wentworth v. Day, 3 Met. 352, 37 Am. Dec. 145;
Wood v. Pierson, 7 N. W. 888, 45 Mich. 313;
McFarlane v. Bloch, 115 Pac. 1056, 59 Ore. 1; Ann. Cas. 1913B 1275;
Cummings v. Gann, 252 Pa. 484;

In *Robertson v. U. S.,* 343 U.S. 711, 96 L. Ed. 1237, 1240 the court said:

> "The acceptance by the contestants of the offer tendered by the sponsor by the contest creates an enforceable contract. See 6 Corbin on Contracts, Sec. 1489; Restatement, Contract, Section 521."

See also published offers of reward, *Scott v. People's Monthly Company,* 228 N. W. 263, 209 Iowa 503, 67 A. L. R. 413; *Reif v. Paige,* 13 N. W. 472, 55 Wis. 496, 42 Am. Rep. 731.

The plaintiff accepted the reward before there had been any revocation as required by law. To this date there never has been any revocation, either in newsreel or newspaper publicity.

The rule regarding revocation is set forth by the United States Supreme Court in *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697, to the effect that where an offer has been made by a publication to a large number of unidentified persons, the power of acceptance is created in all those who read it. This power can be terminated or revoked by publication in the same manner as the offer.

The rule set forth in Restatement of the Law on Contracts, Section 43, is that:

> "An offer made by an advertisement in a newspaper, or by general notification, to the public or to a number of persons who identity is unknown to the offerer is revoked by an advertisement or general notice given publicity equal to that given to the offer before a contract has been created by acceptance of the offer."

In *Carr v. Mahaska County Bankers Association,* 260 N. W. 494, 222 Iowa 411, 107 A. L. R. 1080, it was held that where a bank had offered a reward for the capture of bank robbers by tacking up a poster containing the offer it was not an effective revocation for the cashier to remove that poster. (See also *Sullivan v. Phillips,* 98 N. E. 868, 178 Ind. 164, Ann. Cas. 1915 (B) Sec. 670.

II.

THE FINDING AND CONCLUSIONS OF LAW ARE INCONSISTENT AND CONTRARY TO THE LAW AND THE EVIDENCE. THEY ARE THEREFORE CLEARLY ERRONEOUS.

(A)

ALL THE EVIDENCE CONCLUSIVELY SHOWS THAT TWO OFFERS WERE CAUSED TO BE MADE BY WARNER BROTHERS PICTURES, INC., THROUGH THEIR AGENTS AND REPRESENTATIVES — BURT LANCASTER AND THE WARNER BROTHERS PICTURES, INC., PUBLICITY DEPARTMENT AND ITS TOTALLY OWNED SUBSIDIARY, WARNER'S NEWSREEL, THE COURT NEVERTHELESS FOUND IN FINDING IX "THAT NO OFFER AS SET FORTH IN THE COMPLAINT WAS MADE BY DEFENDANT WARNER BROTHERS PICTURES, INC., OR FOR IT OR ON ITS BEHALF."

This Finding, also, inconsistently finds that "Said alleged offer was in fact expressly withdrawn before plaintiff attempted to accept the same."

Thus the finding says first that *no offer* was made; and then it says that the *offer* was withdrawn. Where a court makes inconsistent findings of fact, the judgment should be reversed since they tax judicial credulity, ignoring plain reality, and override inescapable convictions." *U. S. v. Muschany* (C.C.A. 8) 139 F. (2) 661.

Section 392, California Code of Civil Procedure.

In *Mayo v. Lakeland Highlands Can. Co.*, 309 U. S. 310, the court said:

> "Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.
>
> "It is of the highest importance to a proper review of the action of a court . . . that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The findings find (1) that there was no contract; (2) that there was a contract, but that it was withdrawn; (3) that there was a contract which was not withdrawn, but was not fully complied with by the plaintiff (Findings IV and V). The court finds that Burt Lancaster did not perform the stunts shown in the picture to have been performed (Finding X) but that he did perform all his daring stunts shown in the picture.

Thus, the findings represent characteristically defenses often set up in criminal cases—"There was no conspiracy; if there was a conspiracy, I didn't joint it; if I joined it I withdrew before the conspiracy went into effect; if I didn't withdraw, my acts were perfectly lawful; what I did, I did in self-defense." The findings are about that consistent and that satisfactory.

Finding X is clearly against all of the evidence and the law.

In Finding X the court specifically finds that the sequence in said picture which showed the character Dardo carrying the character Rudi for about 25 feet along the crest of a roof, in the distance, and silhouetted against the sky, was actually performed (not by Burt Lancaster) by one Don Turner, who doubled for Lancaster and who carried a midget. This finding was alone sufficient to sustain the plaintiff's case.

But, the court said that it finds that the action so portrayed "was not a stunt and was not daring or dangerous." However, the definition of a "stunt" according to Webster is as follows:

> "Stunt"—a feat or performance, as an athletic contest, striking for the skill, strength, or the like, required. Hence any unusual feat or performance, especially done to attract attention, general applause, etc."

However, the picture itself defined what is a "stunt" and what is daring or dangerous. The motion picture made a representation to the public in this scene as being a stunt and as one that was daring or dangerous. It was not the part of the court to re-define it, as the offer of the million dollars, to-wit, Warner Brothers Pictures through its publicity department and its star Burt Lancaster, represented to the public that this was a stunt and was daring and dangerous. As such it gave its own definition to the terms of the offer, and the public and the plaintiff had a right to look to the picture as to what constituted the offered reward.

The Court further found that in the sequence which shows "the character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in the said sequence for Burt Lancaster." (Finding X). This also was a stunt within the definition given it in the picture and entitled the plaintiff to judgment, but the court went on to find: "That the action of said sequence did not constitute a stunt nor was it daring or dangerous." This finding is unsupported by the picture itself which gave it definition, or by the evidence. It was not for the court to find contrary to the definition given by the offerers themselves as to what they deemed was a *stunt* and was daring or dangerous as shown in the picture. Furthermore, there were two offers made—one was through the medium of the Los Angeles Mirror, (R. 305), which made the offer of the $1,000,000 "for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in the new picture." That offer did not define or limit the offer to "daring stunts" but all the stunts which Burt Lancaster is shown doing in this picture. After the publication in the Los Angeles Mirror was seen by the Publicity Department of Warner Brothers no offer was made to correct it or change it, but every effort was made to take full benefit of the publicity which was given to it. An offer thus espoused by the Studio Publicity De-

partment is binding upon them, and the court erred in its finding attempting to limit the stunts to those that were "daring or dangerous."

The second offer through Warner Brother's Newsreel did mention the word 'daring". It stated that it was a genuine bona fide offer. (R. 314). The offer proposed and represented that Lancaster was doing somersaults from six horizontal bars sixty feet in the air. (R. 313). Actually the proof by the plaintiff showed that he was not over 20-feet in the air.

The evidence also showed that in the sequence where the band rides into the courtyard to rescue Papa Pietro with sapling spears, in which there was a hand-to-hand encounter, Don Turner doubled for Burt Lancaster in the part of Dardo, (R. 165) and that Turner rode into the square and engaged in some part in the fight with the soldiers where he was using the sapling spears. And, then in the following sequence, where the character Dardo jumps onto the ox-cart and cuts Papa Pietro down and drives the team out of the square, he doubled for Burt Lancaster. (R. 166). In the character of Dardo he drove one horse out. In the next sequence, near the end of the picture, there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro, which occurred in the castle shortly before the time that Ulrigh was killed by the bow and arrow by Dardo, Don Turner played the part of Dardo in two shots in the picture. In that duel, his back was to the camera. (R. 166, 167).

Under Federal Rule of Civil Procedure 52(a), it is contemplated that there be a system of findings, which are of fact and definite.

Footnote, headnote 3, Dalehite v. United States, 346 U. S. 24, 25, 97 L. Ed. 1435.

When Findings of Facts by a trial court are clearly erroneous, judgment should be reversed.

United States v. U. S. Gypsum Co., 333 U. S. 395.

A finding is clearly erroneous when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U. S. 395, 92 L. Ed. 766.

When a finding is against the weight of the evidence it is clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure.

Maple Island Farm v. Bitterling, 209 Fed. (2) 867;
Kasper v. Baron, 207 Fed. (2) 744;
Aetna Life Ins. Co., v. Kepler, 116 F. (2) 1.

(B)

THE CONCLUSIONS OF LAW, THUS DRAWN FROM THE INCONSISTENT FINDINGS WERE LIKEWISE INCONSISTENT. (R. 45).

The first conclusion is that no valid offer was made by Warner Brothers. The second, that the offer was

not accpeted until after the same was withdrawn, which is inconsistent with the fact that no offer was made because it could not be withdrawn if no offer was made.

The third conclusion that Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow presupposes that there was a valid offer made and accepted, but that the proof did not measure up to the offer as made, which is inconsistent with the other findings and conclusions.

And, the fourth conclusion "That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous" is an admission that Don Turner did appear in place of Burt Lancaster, and that he did appear in what the picture represented and portrayed as stunts, and that it was not Burt Lancaster. The conclusion is inconsistent with the definition by the motion picture itself as to what is a stunt and what is daring.

The conclusions, clearly erroneous under Rule 52(a) F. R. C. P. therefore, are contrary to the law and the evidence and entitled the plaintiff to his recovery.

Morris v. Williams, 149 Fed. (2) 703, 707, and see cases supra;

S. Bicca-Del Mac v. Michins Shoe Co., 145 F. (2) 389, 407.

III.

THE COURT ERRED IN ITS RULING THAT THE OFFERED REWARD HAD BEEN WITHDRAWN PRIOR TO THE ACCEPTANCE THEREOF.

The withdrawal was attempted by attorney Gordon L. Files, representing Warner Brothers, after the plaintiff had notified him that he would prove that Burt Lancaster did not perform all the stunts shown in the picture.

A published offer of a reward can only be withdrawn in the same form and manner in which it was made, and where it is offered through motion pictures and broadcasts and through the newspapers, it can only be withdrawn in the same manner.

> *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697;
> Restatement of Law on Contract, Section 43.

The abortive attempt by the attorney to withdraw the offer by this individual communication was therefore of no effect and did not constitute a withdrawal. The withdrawal had to be in the same form and manner in which the original announcement was made, or at

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"A. Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, and got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understainding that Mr. Lancaster had performed all of his own stunts in the picture." (R 191.)

least through the same medium. There was no attempt to withdraw at any time, even to this date. either through the Los Angeles Daily Mirror or through the Warner Brothers' Newsreel.

IV.

THE DISTRICT COURT ERRED IN DECIDING AND FINDING THAT THE ACTS OF THE HERO IN THE PICTURE PERFORMED BY DON TURNER IN PLACE OF BURT LANCASTER WERE NOT "STUNTS" WITHIN THE MEANING OF THE OFFER OF THE REWARD.

Definition as to what constituted a stunt was given by the picture itself. The word "stunt" must be taken in its usual and ordinary meaning. That definition has been previously set out here in.

Coupled with the definition was the picture's own depicting of what were stunts and also what might be deemed to be daring.

Also the pay schedule (R. 36) of defendants—their hiring and paying stunt men stunt wages to do Lancaster's doubling admits that these were "stunts."

V.

THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS IN ACCORDANCE WITH THE ADMITTED AND UNDISPUTED EVIDENCE.

As are set out in specification VI pages 23 and 26 supra, a party is entitled to specific findings on undisputed evidence Rule 52 F. R. C. P.

VI.

THE DISTRICT COURT ERRED IN DENYING PLAINTIFF REASONABLE EXPENSES AND REASONABLE ATTORNEY'S FEES UNDER RULE 36 AND RULE 37(c) RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES.

Upon request for admissions by the defendant as to the part played by Burt Lancaster and Don Turner in the picture The Flame and the Arrow, the defendant falsely answered the same. This was admitted in the affidavit of Eugene D. Williams, one of the attorneys for Warner Brothers Pictures, Inc., as follows:

> "That the person in the motion picture 'The Flame and the Arrow' portraying the character 'Dardo' in the sequence where 'Dardo' carrying 'Rudi' is shown in a long shot running along the crest of the roof of a church or high building was not portrayed by Burt Lancaster, but was por-

trayed by a double, Don Turner. There is, however, another sequence immediately preceeding that sequence in which Burt Lancaster in the character of 'Dardo' does carry the midget depicting the character 'Rudi' along the lower edge of the same roof and therefore in respect of that latter sequence the answer to the Request for Admissions is true, while in respect to the former sequence it is not true." (R. 66.)

The affidavit thereafter seeks to justify the false answer to Interrogatory No. 3. However, Rule 37(c) provides for the payment of counsel fees and costs where a false admission is made. The reasons for the false admission do not waive the requirement of payment; otherwise the rule would be a nullity.

Modern Food P. Co. v. Chester Pack. etc. Co., 30 Fed. Supp. 520;
Metropolitan Life Ins. Co. v. Everett, 15 F. R. D. 498, 499.

The foregoing present important questions of law and procedure and construction of Federal Rules 52(a), 36 and 37(c) which should be decided by this Honorable Court. The opinion below was written by a district judge, and upholds another district judge.

The case has been wrongly decided.

WHEREFORE, plaintiff prays that a Writ of Certiorari issue and for reversal of the judgment and order below on each of the grounds set forth in this brief, with directions to the court below to enter judg-

ment for and on behalf of the plaintiff for One Million Dollars with interest, and cost; and to enter judgment for the plaintiff for costs and attorneys fees under Rule 37(c), Rules of Civil Procedure for the District Courts of the United States.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULES GARRISON, *Appellant,*	)	
vs.	)	No. 14,316
WARNER BROTHERS PICTURES, INC., a corporation, *Appellee.*	)	Oct.3,1955

Appeal from the United States District Court for the Southern District of California, Central Division.

Before STEPHENS and FEE, Circuit Judges, and WIIG, District Judge.

Wiig, District Judge:

Garrison appeals from an adverse judgment in his action for breach of contract against Warner Brothers Pictures, Inc., a corporation. Trial was had before the district court, sitting without a jury, and judgment was entered based upon the court's findings of fact and conclusions of law.

The breach of contract was predicated on offers made by Warner Brothers, through the media of a newsreel and newspaper stories, that it would pay $1,000,000 to anyone who could prove that actor Burt Lancaster, the star of a motion picture entitled "The Flame and the Arrow," did not perform all the dar-

ing stunts he was shown doing in the motion picture. Garrison saw the newsreel and the motion picture. He then had two telephone conversations with an attorney for the corporation. In the first conversation he told the attorney he "felt sure," "thought," or "believed" he could prove that Lancaster had not done all of the stunts in the picture. Three days later, Garrison told the attorney he could prove his claim. (No effort, however, was made to prove it until the trial of the action, about three years later.) Garrison, a resident of Los Angeles, California, also told the attorney that if he would "arrange for Warner Brothers to buy me a ticket to New York and a suit of clothes and some change to put in my pocket I will go to New York" and "forget about it." The attorney told Garrison it was his position that no offer had been made but that if Garrison thought one had been made it was withdrawn. Later, Garrison, through his own attorney, wrote Warner Brothers that Garrison had accepted the offer and had given proof that Lancaster "did not do all of the stunts he is shown doing in the picture."

The illusory offer apparently confounded Garrison's trial attorney. The complaint alleged, among other things, that Warner Brothers offered to pay the sum of money to anyone who could prove Lancaster "did not do or perform all of the stunts he was shown doing *or purported to perform*" in the motion picture. (Emphasis supplied.) A careful examination of the record fails to reveal any evidence in support of the

making of an offer in the words or language alleged in the complaint. The trial court's finding that no offer as set forth in the complaint was ever made was clearly correct.

If a bona fide offer is made and is accepted within a reasonable time without conditions and without varying its terms, a contract may arise. There can be no contract if the offer is revoked before a valid acceptance. The evidence showed that Garrison never performed acts which would have constituted an unqualified acceptance of the alleged offer. At the most, he indicated only that he thought he could prove Lancaster did not do all the daring stunts shown in the motion picture.

Garrison urges that the attempt to revoke the offer by direct communication with him was ineffectual because the revocation must have been made by the same means as used in making the offer—newsreels and newspapers. This unique contention is not supported by any authority or reason. As to the remaining members of the public, the same media would have to be used in order to revoke the offer, but as to Garrison, direct personal notice that it had been withdrawn was sufficient.

In connection with the issue as to whether Lancaster performed all his daring stunts in the motion picture, Garrison proved that in three episodes a substitute actor appeared in the film portraying the character played by Lancaster. By the use of trick photography in a scene wherein this character was shown

carrying a young boy along the crest of a roof, it would appear to a viewing audience that the action was daring or dangerous. However, in the motion picture set, a platform two feet wide was erected behind the false front of the building. Approximately four feet below that platform, there was another platform three feet wide protected by a hand rail three and a half feet high. None of this, of course, was shown in the film, but it was along the upper platform that the actor actually ran carrying the youth. In the second episode, the substitute actor entered a courtyard on horseback, came to a stop, stepped down to the bed of a stationary two-wheel cart, cut a rope by which another character was suspended, and then drove the horse pulling the cart away from the courtyard. In a sword fight or duel, two short views showed the arm and shoulder of the substitute actor. To the audience, the action portrayed actual combat. This illustion was dispelled by testimony of a fencing instructor, who described himself as a "motion picture choreographer of fencing," to the effect that all the action was laid out and memorized and practiced in advance in the same manner as the choreography of a ballet. The trial court found that the foregoing did not constitute stunts. We have viewed the film and examined the record, and affirm the trial court's finding in this respect.

Garrison urges that the picture itself defined the term "stunt" and what is daring or dangerous through its representation to the public that what the public saw on the screen was real. Warner Brothers answers

by saying: "This disregards entirely the fact that any motion picture in its entirety is an illusion," and adds that: ". . . what constitutes a 'daring stunt' cannot be tested by the apparent danger created through the ordinary practices of the dramatic acts." We accept the answer.

Before trial, Garrison filed a request for admissions pursuant to Rule 36, Federal Rules of Civil Procedure. Warner Brothers, in its answer filed ten days later, denied one of the requests, the denial being based on the information furnished counsel for the corporation at that time. A year and a half before trial, more information was developed during the taking of Lancaster's deposition, and it was learned that the denial of the admission was in error. Garrison's attorney was then apprised of the truth as to this portion of the testimony which he proposed to offer during the trial.

In an affidavit in opposition to Garrison's motion for an order requiring payment of attorney's fees and costs pursuant to Rule 37(c), Federal Rules of Civil Procedure, Warner Brothers' counsel admitted the error but set forth facts showing that an honest and concerted effort had been made prior to filing the answer to secure all available information concerning the request, and that the denial was made in the belief that it was accurate. Under the circumstances, the trial court did not err in denying the motion for attorney's fees and costs.

(Endorsed:) Opinion. Filed Oct. 3, 1955.
Paul P. O'Brien, Clerk.

APPENDIX B

$500,000 FOR TIP ON ALIEN BOMB VOTED

House Passes Bill Setting Rewards for Spotting Sabotage

WASHINGTON, July 5 (AP)—The House voted unanimously today to pay a reward of up to $500,000 to anyone who uncovers an effort to smuggle atomic bombs or nuclear material into the United States.

The measure, which now goes to the Senate for action, was aimed at protecting the nation against sneak atomic attack. Officials have warned that a single saboteur armed with a "suitcase" A-bomb could cause untold damage.

Prior to Attack

The Joint Congressional Atomic Energy Committee, which recommended the reward, said it is possible for a saboteur to "smuggle nuclear devices or special nuclear materials into this country" and "destroy vital targets" prior to an enemy attack.

"It must be assumed that potential enemies can now devise small atomic weapons, so constructed as to minimize the chance of detection by customs, by counter-intelligence or defense personnel," the group said.

The committee noted that the measure was backed by the Justice Department, the Atomic Energy Commission and the Central Intelligence Agency, the nation's top-secret espionage agency.

Alert Year Ago

The FBI more than a year ago alerted police officials across the nation to watch out for "bombs or parts of bombs which might be smuggled into the United States."

Under the House-approved bill, cash rewards to individuals uncovering such an attempt could range up to $500,000. The President would have to approve any reward of more than $50,000.

In addition, the legislation would grant permanent sanctuary in this country to any alien who tips off this country to atomic smuggling efforts.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 615.

JULES GARRISON,

Petitioner,

vs.

WARNER BROS. PICTURES, INC., a corporation,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

The petitioner asks review of an affirmance by the Court of Appeals (Ninth Circuit) of a judgment in favor of respondent rendered by the United States District Court in a diversity case for breach of contract. Incidental to the action is a denial in both courts below of a claim for attorneys' fees and costs under Rules 36 and 37(c) of the Rules of Civil Procedure, the claim being based upon an assertion of partial falsity in a reply of respondent to a request for an admission made prior to the trial. The basic issues were and are primarily factual and such facts were decided and found by the trial court upon adequate and proper evidence, and were reviewed and affirmed as facts by the Court of Appeals.

Questions Presented.

(1) Does the evidence support the findings that the alleged offer had been withdrawn as to petitioner and that in any event he had not accepted any such offer in compliance with its terms?

(2) Assuming the existence of a justiciable contract, does the evidence support the finding that petitioner had not performed the conditions of such contract?

(3) Is Rule 37(c) of the Rules of Civil Procedure here applicable, and if so, was it error to deny an allowance of costs and attorneys' fees, in view of all the circumstances?

Statement of the Case.

The facts involve occurrences during the production of a motion picture and its subsequent promotion. The motion picture is in evidence [Pltf. Ex. 2, R. 85] and was viewed by both courts below. It depicts in a medieval Italian setting the conflicts of a local Robin Hood with his feudal lord. The main character is portrayed by Burt Lancaster, a well-known actor. The action shown is strenuous and full of fights, chases and rescues, during which the hero performs a large number of acrobatic feats.

The trial court found [F. II, R. 40-43] that a newsreel sequence containing dialogue mentioning a million dollars as a reward [Pltf. Ex. 6, R. 313-314; Pet. p. 7] had been exhibited and that no other offer or purported offer had been made or authorized by respondent. The newsreel itself is in evidence [Pltf. Ex. 1, R. 77] and was viewed by both courts. The language in the newsreel is set forth

in the Findings and included the following [R. 42-43; also Pltf. Ex. 6, R. 313]:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and the Arrow."

No proof was attempted by petitioner until the trial and there he attempted to prove that three specific episodes were stunts and had not been performed by Lancaster but by a double. These episodes referred to in the Opinion of the Court of Appeals and throughout the record involve (1) an escape over a roof; (2) a courtyard rescue; and (3) a duel. The trial court found [F. X, R. 45] that Lancaster had actually performed all his daring stunts shown in the picture. As to the three specific episodes, the finding identifies and describes all of them. It finds that none of them was a stunt or daring or dangerous and also finds that Lancaster had personally performed all of the third episode but that in the other two a double had appeared for him.

Petitioner, though particularly attacking this finding as unsupported by the evidence, sets forth certain evidence (Pet. pp. 14-18), which supports the finding of the trial court that a double had appeared in two of such episodes. He omits entirely any of the evidence showing the character of the episodes and bearing upon the remainder of the finding determining that such episodes were not stunts, daring or otherwise. Both courts below reviewed the films, as well as the testimony, and concluded they were not stunts. Such evidence, which will be indicated in greater detail during the Argument, shows that none of such episodes in which a double was used, involved any

special, unusual or striking skill or any acrobatic feat whatever, or any risk, danger, or daring.

Petitioner, after seeing the newsreel, had telephoned one of the attorneys for respondent and stated he felt sure or thought or believed Lancaster had not done all of the stunts in the picture. Petitioner was told at that time that it was respondent's position that no offer had been made but that if petitioner thought there had been, it was then and there withdrawn. The court found [F. IX, R. 45] and concluded [Con. II, R. 46] that the alleged offer had been expressly withdrawn before the petitioner attempted to accept the same. There was personal and actual notice of revocation as to petitioner. Petitioner in fact indicated that what he wanted was a ticket to New York, a suit of clothes and some change [R. 189, 190, 196]. These circumstances are noted in the Opinion of the Court of Appeals.

Summary of Argument in Opposition to Issuance of Writ.

(1) There is no question presented herein of the character indicated in Rule 19 of this Court nor any question or circumstance tending to impel the exercise of jurisdiction by this Court.

(a) There is no conflict with *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697, in any respect. The notice of revocation here was actual and personal and the cited case establishing that constructive notice of revocation of a published offer may be given by similar publication does not hold that such method is exclusive.

(b) This is a diversity case for breach of contract as to which the law of California is controlling (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188), and the

policy of California is to prefer actual notice, accepting constructive notice as a substitute only when required by necessity or extreme expediency. No statute or decision in California restricts revocation of a published offer to the constructive notice provided by similar publication.

(2) If the text of the newsreel constituted an offer, it was revoked as to petitioner before acceptance was attempted by him, and if a justiciable contract existed, petitioner did not perform the conditions thereof. He made no attempt to present proof until the trial and at that time the evidence clearly supports the finding that Lancaster had done personally all the stunts he is shown doing in the picture, and as to the three questioned episodes, that Lancaster had performed one of them but that none of the three was in any case a stunt.

(3) The difference between the asserted offer, and the proof presented, is not, as petitioner argues, a mere technical "variance" under outmoded rules of procedure, but is substantive in determining what was a stunt.

(4) There was no error in refusing petitioner any allowance of costs and attorneys' fees under Rule 37(c) of the Rules of Civil Procedure for an asserted violation of Rule 36. There was no violation of Rule 36, in fact, unless petitioner may interpolate into his demand for an admission under that Rule his own interpretation of the words therein used. If Rule 37(c) is here applicable, the allowance of costs and fees was discretionary with the court and here, even if the answer to the demand for admission were partially incorrect, there were ample reasons for denial.

ARGUMENT.

I.

The Findings of the Trial Court That Lancaster Had Performed All His Daring Stunts Shown in the Picture and That the Three Separate Episodes on Which Petitioner Rests Were Not Stunts, Are Fully Supported by the Evidence.

Though the question as to whether there was a contract would logically receive consideration first in point of time, it is clear that if, in fact, the condition of the asserted contract was not performed, then the technical existence of the contract is of little concern, as was indicated by the trial court [R. 274]. If such contract be assumed at this point, it was certainly conditioned upon proof being presented that Lancaster had not done his daring stunts shown in the picture. Out of the many dangerous, daring and acrobatic feats appearing in the picture as involving Lancaster, petitioner was unable to do more than question three episodes, which the court found not to be of such character. The court found that a double had been used in two of the questioned episodes but that Lancaster had performed the third, though none of the three was a stunt. Petitioner claims essentially that these findings are not supported by the evidence.

The questions and the evidence here are plain and clear and do not in any way involve fine "technical" points (Pet. p. 2) or "hypertechnical" discrimination (Pet. p. 33). It may be noted at this point that petitioner in many places urges that "trick photography" was used to deceive the public and, inferentially, the petitioner. The Court of Appeals also uses the words "trick photography" (Op., Pet., App. A, p. 3), but the term was not

used by that court in the sense that petitioner by continuous innuendo now attempts to convey and this clearly appears from the record. The term is in no way used by the trial court in the findings. Trial counsel for petitioner several times stated there was no "trick photography" in these episodes, nor is there any evidence that petitioner was so deceived. Petitioner himself had been employed in this very picture and had been a motion picture actor [R. 147].

The three questioned sequences must be considered somewhat in detail. Finding X [R. 45-46] describes the episodes and finds as already indicated. The evidence hereafter set forth contains the testimony of witnesses, and in each case is in addition to the visual evidence of the motion picture itself, which cannot be put in words, but was seen by both courts below, and is noted by the Court of Appeals (Op., Pet., App. A, p. 4).

(a) First Episode.

(1) The finding:

> "The Court finds that the sequence in said picture which showed the character Dardo carrying the character Rudi for about twenty-five feet along the crest of a roof, in the distance and silhouetted against the sky, was actually performed, not by Burt Lancaster, but by one Don Turner, who doubled for Lancaster and who carried a midget. The Court finds that the action so portrayed was not a stunt and was not daring or dangerous." [R. 45.]

(2) The evidence:

In this sequence, as exhibited in the picture, the figure representing Dardo was not Lancaster but Don Turner. Lancaster had done the precise thing in rehearsal [R.

235-236, 259-260], but in the film actually exhibited, the shot had been made with Turner. The particular sequence occupied only enough time for the figure to move about 25 feet. The particular shot was only a small part of the episode. In the whole sequence, the action shows the rescue by Dardo of a boy from among a crowd in a courtyard. Dardo and the boy are thrown bodily over the heads of the crowd [R. 202-203]. Dardo, carrying the boy on his shoulder, next runs up a temporary scaffold along the front of the building and then up the slanting roof. All of this part of the action, which was difficult, dangerous and required striking and unusual skill and acrobatic ability, was without question performed by Lancaster [R. 174, 202-203, 234]. At the peak of the roof, there was a substitution and the figure, though still apparently the character Dardo, carrying the boy, continued along the crest or ridge. It was in that small portion that the figure representing Dardo was Turner and not Lancaster.

The roof was part of a motion picture set. A sketch showing a cross-section of the structure is in evidence [R. 390] and its nature was fully described by witnesses [R. 175, 220, 248-249]. As in other motion picture sets, the building is merely a front. The part showing in the picture and facing the camera was a building with a steep gable running to a crest 24 feet from the ground. To either the eye or any camera, the building from the front would appear to be normal and with a normal pitched roof, but this optical fact is hardly trick photography. The feats done by Lancaster were all in plain sight on the real and normal side of the building. Along the crest or the apparent peak of the roof but on the side away from the camera, there was substantial scaffolding, including

a runway or path two feet in width and made of heavy timbers. Slightly below the runway itself was another platform or runway an additional three feet in width complete with a 3′-6″ railing or guard. The runways were primarily for the use of electricians or other technicians and were not specially built [R. 248-249, 251]. The runways, the scaffolding and the guard rail being level with the apparent peak or slightly below, would not, of course, show from the front or in the picture. It was along this pathway that the figure was carried about 25 feet by Turner, though Lancaster had already done it once, as noted. The figure at that point was not actually a boy but was a midget and he, as the one carried, testified that he was carried along a platform safe enough for an elephant to walk upon [R. 238].

There is no conflicting evidence on this matter, and even counsel for the petitioner indicated no "trick photography" was involved [R. 207]. Taking the episode as a whole, Lancaster did the difficult and dangerous portion and when it became merely work, his place was taken by Turner. The trial court, fully aware of the circumstances, said that the part Turner did was no more of a stunt than walking into the courtroom [R. 208], and formally found it was not a stunt [R. 45].

(b) Second Episode.

(1) The finding:

> "That in the sequence which shows the character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart

from the courtyard, was performed by Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous." [R. 45-46.]

(2) The evidence:

The episode was completely described by witnesses, whose testimony is in the record. Turner himself (and petitioner nowhere mentions or sets forth any such evidence) said the [R. 171] during the melee in the courtyard, he in the character of Dardo was standing on the sidelines, and when his time came to rescue Pietro, he rode into the scene, brought his own horse practically to a stop, stepped on to the low bed of the cart, cut down the figure being hanged, and drove off. He testified that the cart at the time was stationary and, in fact, that someone was holding the head of the horse that was attached to the cart [see also R. 209-210 and 223-224]. This testimony also shows that it was Lancaster and not Turner in the actual melee. Turner took part in various scenes when he was not doubling for Lancaster but was merely a general character and Turner may have been in the melee as well but not as Dardo or as a double for Lancaster [R. 223-225], and most of the time Turner was on the sidelines [R. 171].

(c) Third Episode.

(1) The finding:

"* * * the Court finds specifically that he [Lancaster] did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alesandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is portrayed by a double, are

two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous." [R. 46.]

(2) The evidence:

Lancaster, in fact, did the whole sequence [R. 215-216, 229]. The sequence had also been done many other times [R. 179], and in the photoplay as released, the two shots mentioned by the court were interpolated from one of the other recordings. Trial counsel twice stated that there was no "trick photography" in this duel [R. 287, 294, 295].

The scene was designed and laid out by one Cavens, a fencing instructor, who referred to himself as a "motion picture choreographer of fencing" [R. 229]. The steps, the movements, the blows, the parries, the advances and retreats, were all laid out, memorized and practiced in advance in the same way that the choreography of a ballet is established. Each actor knows exactly what the other is going to do, how he is going to do it, and when it is to be done [R. 176-178]. The character Dardo was Lancaster and not Turner and Lancaster actually did and was photographed doing the whole sequence [R. 215-216]. Parts of the sequence were, as indicated, done several times and in one of these the camera was so placed to give a full close-up view of the opponent of Dardo, that is to say, Alesandro, and in this particular recording, very short in extent, Turner, being also familiar with the steps and movements, was used in place of Lancaster to save money and time, since the arm and shoulder of Turner alone was picked up by the camera and he was serving almost as a piece of scenery. Similarly, when

a shot was made showing a close-up of Lancaster in one of the other recordings, to show his close-up facial expressions and the like, the opposing sword was held by Cavens. There is not the slightest evidence that these substitutions in these trivial shots were made because of any risk or particular skill needed for that part of the episode. It had already been done once by the actual actors and photographed as a whole.

(d) What Is a Stunt?

Petitioner alleged in his Complaint, as noted by the Court of Appeals, that the offer was of a reward to anyone who could prove that Lancaster "did not do or perform all of the stunts he was shown doing *or purported to perform*" in the motion picture [emphasis supplied; see Complaint, Par. VI, R. 5]. Since the language of the newsreel or of the newspaper, for that matter, used no such language, petitioner now urges that the mention of the difference by the Court of Appeals (Pet., App. A, pp-2-3) between the language of the Complaint and the actual proof is a technical application of the old rule against variance under principles now abolished under the Federal Rules of Civil Procedure (Pet. pp. 31-33). Actually, the question has nothing to do with such possible technical variance but is substantive, in that petitioner argued in the Court of Appeals and now urges that the picture itself defined what would be considered a stunt within the meaning of the newsreel and hence would include all apparent action, irrespective of what actually took place. Both courts viewed the films, and had before them the evidence supplied by those pictures.

Petitioner gives the definition of a stunt in Webster (Pet. p. 47) and such definition describes a stunt as "a

feat or performance * * * striking for the skill, strength, or the like, required * * * any unusual feat or performance * * *." The newsreel was qualified to require that the incident be a "daring stunt." Petitioner, however, insists that the motion picture itself indicated what was daring or dangerous and a stunt (Pet. pp. 47, 53). If so, both courts viewed the picture, and decided the fact. He also claims that the fact that an employee classified as a stunt man did double for Lancaster automatically showed that the episode was a stunt (Pet. p. 53).

The newsreel, in addition to specifying daring stunts [R. 313], did give two samples, consisting of somersaults from six horizontal bars high in the air and walking across a pole 35 feet in the air. The newspaper item also confines itself to the somersaults and the walking of the pole and the additional item of scaling walls. Petitioner disregards these samples in the newsreel or paper as constituting the definition of a stunt and seems to refer only to the actual motion picture. In the former, the samples given are not the episodes here involved in any way nor do they resemble them in action, risk or the requirement for skill or strength. It seems that petitioner disregards these specific matters which might inferentially be called stunts, in view of the language of the newsreel and paper, since beyond question, Lancaster did those things and all other things like them. If petitioner actually means that everything which appeared in the main picture was to be the guide, then every portrayal of the loss of a life therein would be the supreme stunt. Nevertheless, whether it be on the stage or in a motion picture, it must be taken as common knowledge that the actors do not really kill each other even though the villian

appears to have been stabbed through the heart. The fact that an actor appears to have received a mortal wound does not make his work necessarily hazardous or involve special skill or strength or in fact call for anything other than the exercise of normal dramatic art. This fact is recognized by the Court of Appeals (Op., Pet., App. A, pp. 4-5).

Nor is the fact that an employee in the technical classification of a stunt man does a bit of work make that work a stunt. In the courtyard scene (Episode 2), it was a stunt man who held the head of the cart horse to prevent any movement [R. 171], and it is difficult to believe that even petitioner would attempt to classify the holding of a quiet, stationary cart horse by the bridle to be a stunt.

The fact that there was no actual danger in any of the three episodes here is very apparent, as is the contrast to what Lancaster himself did. None of the portions of the action in which in any of these episodes Turner doubled for Lancaster involves any daring whatsoever, nor any striking skill or strength or constitutes any unusual feat or performance, as Webster put it. It is also clear that whatever was required of the character Dardo which needed striking skill or strength or constituted an unusual feat was actually done by Lancaster. He was capable of doing it, had done it for a living in the past and actually did it.

In the duel scene (Episode 3), if participation in a rehearsed and completely laid out choreographical duel could in any way be said to require striking skill or be unusual, then it is equally clear that Lancaster did the whole sequence. However, from the evidence, the duel no more

involved a stunt than the performance of the chorus in a formal ballet.

The three portions of Finding X which petitioner attacks, obviously do two things. They find whether Lancaster did or did not do the particular episodes and that such episodes were not stunts. Petitioner has confined himself to presenting and discussing evidence showing whether or not Lancaster did the episodes. Since the court found that in the first two such episodes Lancaster did not do it, such evidence merely supports the finding. Petitioner does not set forth or advert to the very clear evidence herein set forth and which, with the picture itself, bears upon the remaining portion of the findings, determining in each case that the episode was not a stunt.

II.

There Was No Justiciable Contract Here.

(a) No Possible Conflict With Shuey v. United States, and Revocation by Personal Notice Is Effective.

The trial court here found that there was no contract. It found [Findings II and III, R. 40-43] as a fact that there was no offer or purported offer other than that which might have been contained in the newsreel; that petitioner did not accept any such offer [F. III, R. 43], and that the alleged offer was expressly withdrawn before petitioner attempted to accept the same [F. IX, R. 45]. Each of such findings was fully supported by the evidence. The language of the newsreel has been discussed. It was restricted to "daring stunts." The telephonic conversations between petitioner and Mr. Gordon Files have been noted and are commented upon by the Court of Appeals as failing to constitute any acceptance. Clearly, petitioner was given actual and personal notice

of revocation. Petitioner urges that an offer made through the medium of a newsreel can be revoked only by an appropriate announcement also presented by the same means, that such method of revocation is the *exclusive* method available, that personal notice to an individual is entirely unavailing, and that any holding to the contrary is in conflict with *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697.

In *Shuey v. United States,* decided by this Court in 1876, there had been a revocation of an offer of reward by similar publication as was given to the original offer, and this Court held it to be effective. The idea that this holding established an exclusive method of revocation of a general offer appears to have stemmed from a casual and very early comment of Sir William Anson, in which, citing the *Shuey* case, he indicated that in America revocation of a general offer can be revoked only in the way in which it is made. This comment appeared throughout many editions of Anson on Contracts and is found as Footnote A, page 45, of the 11th English Edition, published as the 2nd American Edition, in 1907. It was repeated in the 3rd American Edition at page 55. The comment has not been accepted by later American writers and the whole rule is well stated by Professor William Page in his Law of Contracts, 2nd Edition, Section 135, page 205, as follows:

> "If an offer has been made to the general public, as by advertisement, such offer may be revoked by a similar advertisement, * * * or by other equally public means; as well as by actually communicating notice of such revocation to some specific person in order to revoke such offer as to him."

Professor Williston (Williston on Contracts, Rev. Ed., 1936, Sec. 59, p. 164, Vol. 1) puts it that

> "* * * such an offer is irrevocable as to any person who is not actually notified of the revocation * * *"

unless there is a reasonable effort to bring notice home to the public by similar publication.

In the present case, there was actual notice and even under the general rule, there is nothing conflicting with *Shuey v. United States* in any respect. Even if there were, the present case is a diversity case for breach of contract as to which the law of California is controlling (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188), and while there appears to be no California decision which describes the manner in which a general offer may be revoked, the State statutes appear clearly to be consonant with the general rule as stated by Professor Page. Section 43 of the Restatement of the Law of Contracts, noted by petitioner (Pet. p. 44), merely reflects the permissive language of the *Shuey* case.

Section 1587 of the California Civil Code states:

> "A proposal is revoked: (1) by the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Sections 1581 and 1583 before the acceptance has been communicated to the former."

Section 1581 referred to provides that:

> "Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication."

Section 1583 merely provides that a communication is effective when put in course of transmission. Section 18 of the California Civil Code states that notice can be either actual or constructive.

From these statutes, it is clear that notice of a revocation must be communicated and that such communication can be either actual or constructive in character. In the *Shuey* case, the communication was constructive only. In the present case, the communication was direct and personal. The question, of course, is not of general revocation but revocation as to the petitioner.

The Supreme Court of California in *Stockton Automobile Co. v. Confer,* 154 Cal. 402, at 408, 97 Pac. 881, a case not comparable factually, nevertheless expresses the policy of the State as being that:

> "* * * the law always favors a personal notice, and countenances substituted and constructive notices as matters of necessity or extreme expediency."

Certainly, the decision in the present case cannot be said to be in conflict with *Shuey v. United States,* and the personal and actual notice here present is fully within the statutory law of the State, as above set forth.

(b) There Was No Acceptance of Any Offer.

The trial court found [F. III, R. 43] that the plaintiff did not accept any offer, and did not gather or seek evidence or prove or submit proof of the facts which were the condition of the offer or even attempt to do so until after the alleged offer had been withdrawn [F. IV, R. 44; F. IX, R. 45; Con. II, R. 46]. The evidence on the

point is noted in the Opinion of the Court of Appeals (Pet., App. A, p. 2). Mere thoughts or beliefs or feelings are different from proof, and a partial or qualified acceptance or a counter offer is not an acceptance (Op., Pet., App. A, p. 3). To be effective, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested. (Sec. 59, Restatement of the Law of Contracts; Code Civ. Proc., Sec. 1585; *Wristen v. Bowles,* 82 Cal. 84, 22 Pac. 1136; *Tilley v. City of Chicago and County of Cook,* 103 U. S. 155, 26 L. Ed. 374.)

(c) The Element of Intent to Contract Is Not Demonstrated.

Petitioner, intermingled with other arguments, cites *Carlill v. Carbolic Smoke Ball Co.,* 1 Q. B. (C. A.) 256 (Pet. p. 42), and others in which the question was whether there was an intent to contract (Pet. p. 36). Quite aside from the found fact that any offer had been revoked, the nature of the language in the newsreel here and petitioner's vague assertions at the time of his asserted acceptance over the telephone, indicate there could be no justiciable contract.

The newsreel in language and action shows Lancaster purporting to count a reward described as a million dollars, dollar by dollar. He says he has done it three times [R. 313] and, of course, literally speaking, it would take a person in excess of three months, working full time, to so count a million dollars, dollar by dollar. The dialogue twice refers to giving away a million dollars [R. 314], and an offer to make a gift does not result in a contract.

Language, setting and amount are all, we suggest, such as would cast very serious doubts upon any possible belief of petitioner that there was a true intent to contract under or by reason of the newsreel announcement. When the conditions of the newsreel presentation are considered in connection with petitioner's vague and tentative response, then his beliefs and intentions should be seriously questioned.

In addition to intent, there must, of course, be consideration to establish a justiciable contract. Consideration did exist in *Carlill v. Carbolic Smoke Ball Co., supra.* This case was the major subject of discussion in *Briggs v. Miller,* 176 Wis. 321, 186 N. W. 163. It is there pointed out that in the *Carbolic* case, after learning of and in reliance upon the offer or warranty, the plaintiff purchased the device in question and used it as directed but nevertheless the device failed to perform. The Wisconsin court notes that the defendant derived a direct benefit from the sale of the device and that the same was true in other cases of the same class, thereby distinguishing it from the facts in the *Briggs* case. Consideration for an offer for a reward may often be found in an act such as production of proof or giving of information but the mere announcement of acceptance is not consideration.

The Restatement of the Law of Contracts, Section 75, Subdivisions (b) and (c), notes the rule as being that consideration must be actually bargained for and that the fact that one party relies upon a promise, to his injury, does not establish consideration without the element of bargain or agreed exchange. This statement is quoted with approval by the Supreme Court of California in *Bard v. Kent,* 19 Cal. 2d 449, at 452, 122 P. 2d 8.

III.

There Was No Error in Refusing Petitioner Any Allowance of Costs or Fees Under Rule 37(c).

The Opinion of the Court of Appeals (Pet., App. A, p. 5) sets forth the general facts and affirms that under the circumstances there was no error in denying petitioner any allowance of fees or costs under Rule 37(c). In addition to the grounds there stated, respondent submits that Rule 37(c) is wholly inapplicable, whether or not it is mandatory, unless there is a violation of Rule 36, and that here such violation does not in fact exist.

Petitioner claimed $25,000 counsel fees, plus costs [R. 61]. In 1951, he had made requests for admissions under Rule 36 [R. 17-20]. The issue concerns the third request [R. 18] where respondent was requested to admit [R. 18] that the person "who ran along the edge of the roof of a church or high building carrying another person" was not Lancaster. To this, the respondent answered "no" [R. 38]. The proof did show, as already described, that Lancaster was the person who did the major and stunt portion of the episode but was not the person who went along the crest or peak of the roof.

If petitioner may now interpolate his own definition of what is the "edge of the roof" to mean only the ridge or crest, then the answer could be considered incorrect. A gable roof has a crest or peak or ridge in the center, two sides and a lower boundary along the eaves. Lancaster had done all of the action along the lower boundary and up the side and since these are the "edges" of the roof, the answer was correct.

Petitioner cites two trial court decisions (Pet. p. 55) supporting his argument that the rule is mandatory in

this case. *Modern Food Process Co. v. Chester Packing & P. Co.*, 30 Fed. Supp. 520, simply describes the process made available by Rules 36 and 37 and includes the remark that the latter rule permits a penalty in the discretion of the court. *Metropolitan Life Ins. Co. v. Everett*, 15 F. R. D. 498, again describes the process and indicates that the time for making a motion thereunder is after the trial. Neither case purports to interpret the rule as petitioner would here have it or otherwise touch any issue now presented.

Respectfully submitted,

EUGENE D. WILLIAMS,
Attorney for Respondent.

Of Counsel:
FRESTON & FILES,
RALPH E. LEWIS.